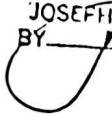


A 1352

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH MCCELROY, JR., CLERK
BY  Deputy

NINTENDO OF AMERICA, INC.

Plaintiff,

v.

CAROL AARON, individually
and d/b/a MAMA'S VIDEO GAMES;
ALL AMERICAN AMUSEMENTS;
ASTRO VIDEO ARCADE; ATLAS
VIDEO GAMES, INC.; COMMERCIAL
MUSIC COMPANY, INC.; JORGE F.
DECKER and RODNEY L. BARBER,
individually and d/b/a THE
SUB SHOP; ELECTRONIC WONDER-
LAND; JAMES R. EZELL, indi-
vidually and d/b/a SHELL
STATION and TEXACO QUICK
FILL; BILL GAGEN; HATTER'S,
INC., individually and d/b/a
MAD HATTER'S; HOLLANN ENTER-
PRISES, INC., individually
and d/b/a CROWN'S DRIVE-IN
GROCERY; JANK ENTERPRISES,
INC., individually and d/b/a
JANKS TEXACO; JOHN H. LEWIS;
L & Y, INC., indivi-
dually and d/b/a GAMES LTD.;
RONALD MARKIS, individually
and d/b/a GAMES GALORE; THE
MIND GAME, INC., individually
and d/b/a MIND ARCADE;
MUSTANG AMUSEMENT; J.W.
PERRY, individually and
d/b/a PERRY'S VIDEO GAMES;
PLAY-MORE GAMES DISTRIBUTING,
INC.; Q.F.D.C., INC., indi-
vidually and d/b/a UNITED
WHOLESALE, a/k/a UNITED
VENDING; QUICK FILL DISCOUNT;
QUORUM INDUSTRIES, INC.;
R & S ENTERTAINMENT COMPANY,
INC, individually and d/b/a
STARS RECORDS & TAPES;
R-KADES, INC.; BOB SNOW;
ROYCE E. STEPHENS and CARL
STPHENS, individually and
d/b/a QUICK CARL'S DELI &
GAMES; NANCY ELAINE SULTAN,
individually and d/b/a
NANCY'S GENERAL STORE and
LA CAFE; MAURICE TERRY;
TEXAS MUSIC COMPANY;
UNITED ELECTRONIC; WEISS-
NUGENT CORP., individually
and d/b/a PAISAN'S ITALIAN
RESTAURANT & PIZZA; BERNIE
E. WILLIAMS; FRED YOUNGBERG.

Defendants.

CIVIL ACTION NO.

CA 3-82 0783 D

COMPLAINT FOR COPYRIGHT AND TRADEMARK
INFRINGEMENT AND UNFAIR COMPETITION

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AFFIDAVIT OF MINORU ARAKAWA IN SUPPORT
OF PLAINTIFF'S MOTION FOR A TEMPORARY
RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

STATE OF WASHINGTON)
COUNTY OF KING) :ss

MINORU ARAKAWA, being first duly sworn, deposes and says:

1. I am president of NINTENDO OF AMERICA INC., plaintiff herein, have personal knowledge of the facts contained in this affidavit and am competent to testify to the same.

2. NINTENDO OF AMERICA INC. is a corporation duly organized and existing under the laws of the State of Washington, with a principal place of business at 18340 Southcenter Parkway, Seattle, Washington 98188.

3. NINTENDO OF AMERICA INC. is a wholly-owned subsidiary of NINTENDO CO., LTD., a corporation of Japan, having a principal place of business at 60, Fukuine, Kamitakamatsu-Chu, Higashiyama-Ku, Kyoto, Japan. NINTENDO CO., LTD., is a manufacturer of coin-operated audio-video games that are imported and distributed in the United States by the plaintiff. The plaintiff is the owner of the exclusive rights to import and distribute in the United States and North America the audio-video games that are the subject of this action, and holds title to all pertinent copyrights and trademarks on such audio-video games.

4. Prior to July of 1981, NINTENDO CO., LTD., began manufacturing an audio-video game called DONKEY KONG and first published the game in Japan on July 9, 1981. Prior to July of 1981, NINTENDO CO., LTD., expended over \$100,000 in direct development costs for the game DONKEY KONG.

5. An English translation of the Japanese term DONKEY KONG is "Crazy Gorilla".

6. On July 27, 1981, NINTENDO CO., LTD., assigned all of its right, title and interest in the United States copyright in the DONKEY KONG game to the plaintiff. A certified copy of this assignment, recorded in Vol. 1864 at pages 320 and 321 in the Copyright Office, is attached hereto as Exhibit A. A certified copy of Certificate of Copyright Registration No. PA 115-040, covering the DONKEY KONG game is attached hereto as Exhibit B. All statutory formalities required to perfect the claim of copyright, including a copyright notice on each game unit, have been complied with by plaintiff.

7. Beginning in July of 1981, the plaintiff began importing DONKEY KONG games. Plaintiff is also manufacturing DONKEY KONG games in the United States. As of the date of this affidavit, plaintiff has imported, manufactured and sold in the United States over forty-one thousand (41,000) DONKEY KONG games.

8. In the United States and Canada, NINTENDO OF AMERICA INC. sells its audio-video games to regional distributors. Regional distributors sell the game to "operators". Operators place the video games in arcades and other public places for public use, and derive profit from collecting proceeds from the coin box of the coin-operated video games.

9. The audio-video game DONKEY KONG has the theme of a fanciful gorilla image perched at the top of a building structure where a lady figure is held captive. A man figure (called Jump Man) attempts to scale the building structure and in doing so he must dodge various hazards and objects thrown or launched by the gorilla figure from the top of the building structure. To aid the

1 man figure, there are hammers and other implements which he can
2 use for a short period of time to destroy the various objects
3 thrown by the gorilla. As the man figure gets to the top, a differ-
4 ent scene will appear, with some different obstacles.

5 Prior to the insertion of a coin, an attract mode, which
6 plays continuously and automatically in repeating sequence, displays
7 the name of the game DONKEY KONG, the copyright notice of NINTENDO
8 OF AMERICA INC. and other information and instructions concerning
9 the game, and includes a brief segment of a simulated play mode
10 showing the gorilla figure, building structure, the lady and man
11 figures and the hazards and obstacles encountered by the man figure.
12 After insertion of a coin and during the play mode, movement of
13 the man figure is partly under the control of the game player who
14 uses a control stick and a pushbutton switch to guide the man
15 figure up the building structure, and to avoid the mentioned hazards
16 and obstacles. Musical and other unique sound effects accompany
17 the video presentation.

18 10. There are two primary trade publications covering the
19 industry in the United States. These are Play Meter and Re Play.
20 A recent copy of Play Meter, dated April 15, 1982, contains rankings
21 of the top video games based upon average weekly grosses as reported
22 through its regular national operator surveys. The top video game
23 is the plaintiff's DONKEY KONG game. It also indicates that DONKEY
24 KONG has been the top grossing game in the prior two surveys as
25 well. A copy of this Play Meter April 15, 1982 poll is attached
26 hereto as Exhibit C. In the April, 1982 edition of Re Play, DONKEY
27 KONG is listed as the third most popular game behind Ms. Pac Man
28 and Pac Man. A copy of this Re Play poll is attached to this
29 affidavit as Exhibit D. These two magazine polls document the
30 huge popularity and commercial success of this game.

11. The readership of these trade publications consists primarily of manufacturers, distributors and arcade operators of audio video games. In each publication, the plaintiff has given notice of its intent to enforce its proprietary interests in DONKEY KONG. A copy of the published plaintiff's enforcement policy is attached hereto as Exhibit E. In addition, the plaintiff has given specific notice regarding the games infringing upon the DONKEY KONG copyright. A copy of this published notice is attached hereto as Exhibit F.

12. Plaintiff has extensively advertised and promoted the DONKEY KONG video game in the United States. Plaintiff has distributed thousands of brochures for the game. Plaintiff has also used these brochures in its advertising in trade publications. A copy of this brochure is attached hereto as Exhibit G. Plaintiff has invested over one million dollars (\$1,000,000) in the advertising, printing and distribution of brochures and in other marketing expenses for the DONKEY KONG game in the United States.

13. In addition, plaintiff has promoted the DONKEY KONG game at national and local trade shows. It has also developed and licensed certain promotional items, such as DONKEY KONG T-shirts and records.

14. The commercial life of audio-video games of this type is notoriously short and despite the tremendous popularity of the DONKEY KONG game, the bulk of its sales is likely to occur during the first six to twelve months of its commercial life, and thereafter the game's popularity is expected to drop sharply.

15. The DONKEY KONG audio-video game is sold by plaintiff only as a complete integrated game apparatus including a cabinet, video tube and associated video electronics (similar to a televi-

1 sion screen) loudspeaker and internal electronic gameboard, includ-
2 ing digital memory chips, called ROMs, PROMs and EPROMs which
3 generate the information which generate the unique video images,
4 sequences, and sounds of the game. The exterior of the game cabinet
5 has fixed graphics, which are derivations of the fanciful video
6 images that are displayed on the video screen, and such graphics
7 include the trademarks "NINTENDO" and "DONKEY KONG" that represent
8 the goodwill of the plaintiff's business.

9 16. The DONKEY KONG audio-video game has proved extremely
10 popular as indicated by the above history of its sales. However,
11 each legitimate manufacturer, importer and distributor must also
12 carry the losses associated with the development and marketing
13 costs of audio-video games which prove unpopular by hopefully
14 recovering losses from its "hits" such as the DONKEY KONG game.
15 Moreover, while it is extremely costly and painstaking to develop
16 a printed circuitboard for an audio-visual game, such boards can
17 be copied by others relatively easily and at minimal expense.

18 17. Since the rise in popularity of the DONKEY KONG game,
19 there has been a tremendous increase in the number of counterfeit
20 copies of the plaintiff's video game, on a nationwide scale. Such
21 sales now pose an immediate and serious threat to the plaintiff's
22 business.

23 18. In the course of conducting its business, NINTENDO OF
24 AMERICA INC. has received numerous complaints nationwide from both
25 independent distributors and operators of its games that counterfeit
26 DONKEY KONG copies are being distributed and operated on location
27 in competition with genuine games, thereby causing further damage
28 to its relationship with independent distributors of genuine
29 Nintendo products and operators of such games.

19. To combat such piracy, plaintiff has instructed its attorneys to take diligent and expeditious action against the infringement of plaintiff's rights in the DONKEY KONG game. Pursuant to such instructions, lawsuits have been filed on behalf of the plaintiff in several federal district courts against numerous defendants to enjoin infringement of plaintiff's copyright and other rights.

20. Based upon this experience, plaintiff believes that unless the Court temporarily restrain defendants without notice and orders impoundment of infringing games and circuit boards without notice, that defendants are likely to secret evidence.

21. Around February or March, 1982, we began to receive reports of substantial infringement activity in the Dallas, Texas, area and that the defendants were selling or operating games with audio visual effects that are practically identical to the DONKEY KONG video game. These games are being sold and operated primarily under the name CRAZY KONG and CONGORILLA. Since that time, I believe NINTENDO OF AMERICA INC. has lost a substantial number of sales of DONKEY KONG games from distributors who have otherwise purchased infringing games, and that the value of genuine DONKEY KONG games has been diluted.

22. Imitations of the DONKEY KONG game are appearing on a nationwide scale. After observing both the "attract" and "play" modes on a CRAZY KONG game confiscated in a related litigation, and based upon information provided to me by third parties, I believe the CRAZY KONG and CONGORILLA games being sold and operated by the defendants to be a blatant infringement of the plaintiff's copyright in the DONKEY KONG game.

1 23. None of the defendants in this case are licensed or
2 authorized by NINTENDO OF AMERICA INC. or NINTENDO CO., LTD. to
3 import, manufacture, assemble, distribute or sell DONKEY KONG
4 games.

5 24. NINTENDO CO., LTD. may, on occasion, enter into licensing
6 agreements which are limited in scope. Exhibit H, attached to
7 this affidavit, is such an agreement between NINTENDO CO., LTD.
8 and FALCON, INC., dated September 22, 1981. Exhibit I is an accu-
9 rate English translation of Exhibit H, which is in Japanese. I am
10 familiar with the seals of NINTENDO CO., LTD., and can identify
11 Exhibit H. I can also identify Exhibit I as an accurate transla-
12 tion of Exhibit H.

13 25. Article 9 of the licensing agreement restricts the author-
14 ity granted to FALCON, INC., to the territories of Japan. Arti-
15 cle 11(1) of the licensing agreement prohibits FALCON, INC., from
16 importing or exporting any machines "identical or similar to DONKEY
17 KONG or CRAZY KONG". Article 11(3) of the licensing agreement
18 prohibits any third parties in lieu of FALCON, INC., from manufac-
19 turing or selling the games covered by the license.

20 26. The audio-video games manufactured by FALCON, INC., are
21 not authorized to come into the Western Hemisphere. The exclusive
22 right to manufacture, import, assemble, distribute and sell such
23 games in the Western Hemisphere belong to NINTENDO OF AMERICA INC.
24 by virtue of the copyright assignment from NINTENDO CO., LTD. to
25 NINTENDO OF AMERICA INC., and by virtue of the Copyright Registra-
26 tion No. PA 115-040, Exhibits A and B hereto.

27 27. On January 29, 1982, NINTENDO CO., LTD. terminated this
28 license agreement with FALCON, INC.
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28. NINTENDO OF AMERICA, INC., has not licensed or authorized
FALCON, INC., or any other company to import, manufacture or assemble
in the United States any arcade model audio-video game identical
to or similar to the DONKEY KONG game covered by its United States
copyright.

29. The approximate value of the component parts of an audio-
video game is \$1,000.00.

30. As long as the defendants are permitted to continue to
infringe the copyright and trademarks of plaintiff and commit acts
of unfair and deceptive practices against the public and the plain-
tiff by the manufacture, distribution and/or use for profit of
pirated DONKEY KONG game units, loss of goodwill and speculative
losses of potential sales will continue to mount, for which a
subsequent award of monetary damages will be totally inadequate
compensation.


MINORU ARAKAWA

SUBSCRIBED and SWORN TO before me this 7th day of May,
1982.


NOTARY PUBLIC in and for the State of
Washington, residing at Seattle

SNIN:d

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